UNY LLC d/b/a General Super Plating *and* Local 81319, IUE-CWA. Case 03−CA−152609

April 11, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND KAPLAN

The General Counsel seeks a default judgment in this case because UNY LLC d/b/a General Super Plating (the Respondent) has failed to file an answer to the complaint. Upon a charge filed by Local 81319, IUE-CWA (the Union), the General Counsel issued a complaint on August 12, 2015, against the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the Act. The Respondent failed to file an answer.

On January 8, 2016, the General Counsel filed with the National Labor Relations Board an Amended Motion to Transfer Proceedings to the Board and for Default Judgment. Thereafter, on January 20, 2016, the Board issued a Supplemental Notice to Show Cause why the motion should not be granted.[1] The Respondent did not file a response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively stated that unless an answer was received on or before August 26, 2015, the Board may find, pursuant to a motion for default judgment, that the allegations in the complaint are true. Further, the undisputed allegations in the General Counsel's amended motion disclose that on September 1, 2015, the Region sent by regular mail a letter advising the Respondent that unless an answer to the complaint was received by September 15, 2015, a motion for default judgment would be filed. Nevertheless, the Respondent failed to file an answer.[2]

The complaint alleges that on March 20, 2015, the Respondent closed its business and that on March 23, 2015, the Union requested bargaining over the effects of that decision on unit employees. In addition, the complaint alleges that on March 26, 2015, the Union requested in writing that the Respondent provide it with certain information, which it asserted was relevant and necessary for the Union to prepare for effects bargaining, including:

> (1) Audited financial statements for each of the past three years. These should include the balance sheet, income statement, statement of cash flows and all accompanying notes including detailed explanations for any extraordinary, unusual or non-recurring items.
>
> (2) Detailed income statement, balance sheet and statement of cash flows for each of the past three fiscal years.
>
> (3) The most recent available fiscal year-to-date financials and comparative financials for the same period in the previous year. These should include the income statement, balance sheet and statement of cash flows.
>
> (4) Summary of wage and fringe benefit costs for bargaining unit employees for each of the past two years and present year-to-date.
>
> (5) Available contact information for an individual(s) that can answer any relevant questions that may arise regarding the content of the materials provided above.

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to engage in effects bargaining and to furnish information necessary and relevant to the Union's performance of its duties as the

[1] On December 22, 2015, the General Counsel filed a motion to transfer proceedings to Board and for default judgment, which inadvertently failed to include a copy of the information request referred to in the complaint as Exh. A. On that same day, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The General Counsel subsequently filed an amended motion that included the omitted exhibit, and the Board then issued a Supplemental Notice to Show Cause.

[2] The complaint alleges that the Respondent closed its Syracuse, New York facility (the Syracuse facility). It is well established that a respondent's asserted cessation of operations does not excuse it from filing an answer to a complaint. See, e.g., *OK Toilet & Towel Supply, Inc.*, 339 NLRB 1100, 1100−1101 (2003); *Dong-A Daily North America*, 332 NLRB 15, 15−16 (2000); *Holt Plastering, Inc.*, 317 NLRB 451, 451 (1995).

exclusive collective-bargaining representative of the unit employees.

Regarding the information request allegations, an employer has a statutory duty to provide, on request, relevant information that the union needs in order to perform its duties as collective-bargaining representative. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152−154 (1956). It is well established that information pertaining to employees in the bargaining unit is presumptively relevant and must be provided by the employer when requested. See, e.g., *Southern California Gas Co.*, 344 NLRB 231, 235 (2005). Such presumptively relevant information includes the costs of the wages and benefits provided to bargaining unit employees. *North Star Steel Co.*, 347 NLRB 1364, 1364, 1368 (2006). In addition, the Board has found that an employer had an obligation to provide information regarding the cost of discontinued benefits, because the information was relevant and necessary for the union to effectively bargain over the effects of the discontinuation on unit employees. *Rochester Gas & Electric Co.*, 355 NLRB 507, 518−519 (2010), enfd. 706 F.3d 73 (2013), cert denied 573 U.S. 958 (2014) (failure to provide union information about cost of discontinued benefit of allowing employee use of company-owned vehicles to and from work unlawful). Under these principles, the Union is entitled, as a matter of law, to obtain wage and fringe benefit costs for unit employees, as sought in Request 4, and a contact for questions pertaining to that information, as sought in Request 5.

Information that does not pertain to the working conditions of bargaining unit employees, however, including general financial information about the employer, is not presumptively relevant. *North Star Steel Co.*, 347 NLRB at 1369. When a union requests information that is not presumptively relevant, it bears the burden of demonstrating the relevance of that information. Id.; *Southern California Gas*, 344 NLRB at 235. Typically, the Board will find that, "[i]n the absence of a present 'inability to pay' claim, . . . requested financial and competitor information is not relevant to the Union's bargaining representative duties," and an employer is not obligated to furnish the information. *North Star Steel*, 347 NLRB at 1369–1370. See also *NLRB v. Truitt*, supra; cf. *Dover Hospitality Services, Inc.*, 361 NLRB 906 (2014), enfd. 636 Fed. Appx. 826 (2d Cir. 2016) (employer that claimed in contract negotiations that it was unable to pay for existing wages and benefits unlawfully failed to promptly provide requested financial information, including tax returns and audited income statements and balance sheets for 5 years).

The complaint here does not allege that the Respondent has asserted an inability to pay. Applying the above precedent, the Respondent generally would not be obligated to furnish the information sought in Requests 1−3, i.e., audited financial statements, balance sheets, income statements, and statements of cash flow for the past 3 years, as well as the most recent fiscal year-to-date financials and the comparative financials from the previous year. In this case, however, as in *Artesia Ready Mix Concrete, Inc.*, "[t]he central fact . . . is that the Respondent has failed to file an answer to the complaint, and has thereby effectively admitted all the complaint allegations." 339 NLRB 1224, 1225−1226 (2003). See also Section 102.20 of the Board's Rules and Regulations. Thus, the Respondent has admitted that the Union requested the above information in writing on March 26, 2015; that the information requested by the Union, "is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the Unit"; and that the "Respondent [ ] has failed and refused to furnish the Union with the information requested by it." When an employer refuses to provide financial information that was not presumptively relevant, the Board has found that the employer's admission of the allegations by its failure to file an answer was sufficient to support an unfair labor practice finding. *TNT Logistics North America, Inc.*, 344 NLRB 489, 489 fn. 3 (2005).

In the absence of good cause being shown for the failure to file an answer, we deem the allegations in the complaint to be admitted as true, and we grant the General Counsel's Amended Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a corporation with an office and place of business in Syracuse, New York (the Syracuse, New York facility), and has been engaged in industrial electroplating.

During the calendar year preceding the issuance of the complaint, the Respondent purchased and received goods valued in excess of $50,000 directly from points outside the State of New York.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the

Respondent within the meaning of Section 2(13) of the Act:

Kevin Birkmayer	General Manager
Jeffrey Sands	Vice President
Cindy Sommers	Human Resources Director

The following employees of the Respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees of the Respondent described in Article 1 and Appendix A, of the current collective-bargaining agreement in effect between the Respondent and the Union.

At all material times, the Respondent has recognized the Union as the exclusive collective-bargaining representative of the unit. This recognition is embodied in the current collective-bargaining agreement, which is effective from July 25, 2014, through July 28, 2016, as it was automatically extended for an additional year by its terms.

At all material times, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

About March 20, 2015, the Respondent closed its business and ceased all operations.

About March 23, 2015, the Union requested that the Respondent bargain over the effects on unit employees of its decision to close its business.

The subjects set forth above relate to the wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purpose of collective bargaining.

The Respondent engaged in the conduct described above without affording the Union an opportunity to bargain with the Respondent with respect to the effects of this conduct.

About March 26, 2015, the Union requested in writing that the Respondent provide it with certain financial and other information concerning the Respondent, as described above.

The information requested by the Union in Requests 1-5, as described above, is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit.

Since about March 26, 2015, the Respondent has failed and refused to furnish the Union with the information requested by it, as described above.

CONCLUSION OF LAW

By the conduct described above, the Respondent has been failing and refusing to bargain collectively with the exclusive collective-bargaining representative of its employees, in violation of Section 8(a)(5) and (1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, to remedy the Respondent's unlawful failure and refusal to bargain with the Union about the effects of the closing of the Respondent's facility, we shall order the Respondent to bargain with the Union, on request, about the effects of the closing. As a result of the Respondent's unlawful conduct, however, the unit employees have been denied an opportunity to bargain through their collective-bargaining representative at a time when the Respondent might still have been in need of their services and a measure of balanced bargaining power existed. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practices committed.

Accordingly, we deem it necessary, in order to ensure that meaningful bargaining occurs and to effectuate the policies of the Act, to accompany our bargaining order with a limited backpay requirement designed both to make whole the employees for losses suffered as a result of the violation and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. We shall do so by ordering the Respondent to pay backpay to the unit employees in a manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), as clarified by *Melody Toyota*, 325 NLRB 846 (1998).[3]

Thus, the Respondent shall pay its unit employees backpay at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Decision and Order until occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the closure on the unit employees; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union; or (4) the Union's subsequent failure to bargain in good faith.

[3] See also *Live Oak Skilled Care & Manor*, 300 NLRB 1040 (1990).

In no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which the Respondent ceased operations to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner. However, in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ. Backpay shall be based on earnings that the unit employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, we shall order the Respondent to compensate the unit employees for any adverse tax consequences of receiving lump-sum backpay awards and to file a report with the Regional Director for Region 3 allocating the backpay award to the appropriate calendar years for each employee within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

Further, having found that the Respondent has violated Section 8(a)(5) and (1) by failing and refusing to furnish the Union with requested necessary and relevant information, we shall order the Respondent to furnish the information requested by the Union about March 26, 2015.

Finally, because the Respondent has closed its facility, we shall order the Respondent to mail a copy of the attached notice to the Union and to the last known addresses of its unit employees to inform them of the outcome of this proceeding.

ORDER

The National Labor Relations Board orders that the Respondent, UNY LLC d/b/a General Super Plating, Syracuse, New York, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with Local 81319, IUE-CWA (the Union), as the exclusive collective-bargaining representative of the employees in the following appropriate unit about the effects of its decision to cease operations:

> All employees of the Respondent described in Article 1 and Appendix A, of the current collective-bargaining agreement in effect between the Respondent and the Union

(b) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union over the effects on unit employees of its decision to close its business and reduce to writing any agreement reached as a result of such bargaining.

(b) Provide to the Union in a timely manner the information requested by the Union about March 26, 2015.

(c) Pay the unit employees their normal wages for the period set forth in the remedy section of this decision, with interest.

(d) Compensate any employee who receives backpay under this Order for adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, duplicate and mail, at its own expense and after being signed by the Respondent's authorized representative, copies of the attached notice marked "Appendix,"[4] to the Union and to all unit employees who were employed by the Respondent at any time since March 20, 2015.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 3 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 11, 2019

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Mailed by Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

John F. Ring, Chairman

Lauren McFerran, Member

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
MAILED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Local 81319, IUE-CWA as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All of our employees described in Article 1 and Appendix A, of the current collective-bargaining agreement in effect between us and the Union.

WE WILL furnish to the Union in a timely manner the information requested by the Union about March 26, 2015.

WE WILL compensate our unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

UNY LLC D/B/A GENERAL SUPER PLATING

The Board's decision can be found at www.nlrb.gov/case/03-CA-152609 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.